Supreme Court, U. S.
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No. 78-8

In the Supreme Court of the United States

OCTOBER TERM, 1978

BRUCE CARROLL GARLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

PHILIP B. HEYMANN,
Assistant Attorney General,

JOSEPH S. DAVIES, JR.,
PAUL J. BRYSH,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The order of the court of appeals (Pet. App. 14) is noted in a table at 577 F. 2d 743.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1978. A petition for rehearing was denied on June 8, 1978. The petition for a writ of certiorari was filed on July 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence against petitioner should have been suppressed because the affidavit of probable cause in support of a search warrant allegedly contained false information.

2. Whether petitioner was prejudiced by evidence of the tax losses resulting from his production of moonshine whiskey.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted of operating an illegal still, in violation of 26 U.S.C. 5601, 5604, and 5681. He was sentenced to four years' imprisonment.[1] The court of appeals affirmed (Pet. App. 14).

1. The evidence at trial showed that petitioner owned a farm in Calloway County, Kentucky, and that he visited the farm frequently (Tr. 47, 51-52, 65-68, 90-91). On February 3, 1977, agents of the Bureau of Alcohol, Tobacco and Firearms visited the farm and smelled the odor of fermented mash emanating from a wooden building (Tr. 117-121, 266-270). The next day, the agents returned and saw petitioner enter the building and remain inside for about 30 minutes. On three or four occasions petitioner came to the door and looked outside. As petitioner drove away, the agents attempted to apprehend him, but he escaped (Tr. 128-130, 174-175, 197-198, 277-279).

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[1]Petitioner was convicted of having in his possession, custody or control an unregistered still or distilling apparatus, in violation of 26 U.S.C. 5601(a)(1) (Count 1); engaging in the business of a distiller without having filed an application for registration, in violation of 26 U.S.C. 5601(a)(2) (Count 2); carrying on the business of a distiller without having given a bond, in violation of 26 U.S.C. 5601(a)(4) (Count 3); producing distilled spirits without authorization, in violation of 26 U.S.C. 5601(a)(8) (Count 4); possessing distilled spirits without the required tax stamps, in violation of 26 U.S.C. 5604(a)(1) (Count 5); and engaging in the distilling of spirits without posting the required sign, in violation of 26 U.S.C. 5681(a) (Count 6). He was sentenced to concurrent terms of four years' imprisonment on Counts 1 through 5 and one year's imprisonment on Count 6.

The same day, the agents obtained a warrant and conducted a search of the building. Inside they found a partially deactivated still, which could be restored to working order in 15 to 30 minutes, and approximately 53 gallons of whiskey in white plastic jugs. There were no tax stamps on the jugs of whiskey. Treasury Department records showed that no application had been made and no bond had been filed for operation of the distillery (Tr. 141-153, 201-211, 281-310).

2. In the affidavit of probable cause in support of the warrant authorizing the search (Pet. App. 11-13), the affiant, a Treasury Department agent participating in the investigation, stated that he had received information that petitioner was operating an illegal distillery, that he and a state detective had smelled "the distinct odor of fermenting mash apparently emanating" from the building on February 3 (Pet. 12), that petitioner had been observed in the building on February 4, and that petitioner had previously been arrested for offenses involving untaxed spirits and had a reputation for making and selling untaxed spirits. Relying upon evidence adduced at his preliminary hearing before a magistrate, petitioner moved before trial to suppress the evidence seized pursuant to the warrant on the grounds that the affidavit contained inaccurate information. The trial judge denied this motion (Tr. 14).

ARGUMENT

1. Petitioner contends (Pet. 6-9) that his motion to suppress evidence should have been granted because the affidavit of probable cause contained inaccurate information.

In *Franks* v. *Delaware*, No. 77-5176, decided June 26, 1978, this Court held that false information in an affidavit in support of a search warrant application requires

suppression of evidence only if the false information is material to the existence of probable cause and is presented intentionally or in reckless disregard of its truthfulness.[2] In this case, however, petitioner did not succeed in convincing the district court, and has not demonstrated in his petition, that the information in the affidavit was even false, let alone intentionally or recklessly so.

Petitioner's primary contention is that, at the preliminary hearing (C.A. App. 13-14)[3] and at trial (Tr. 270) the agent described the smell as "fermented" mash, but in the affidavit he had described the odor as that of "fermenting" mash. On neither occasion, however, did petitioner attempt to enlarge upon what he now claims was a fatal discrepancy; nor has he ever suggested that the smell of fermented mash is any different from that of fermenting mash. Indeed, after the agent described the odor as that of fermented mash on direct examination at trial (Tr. 270), he responded in the affirmative when asked on redirect examination whether the odor was that of fermenting mash (Tr. 323), thus indicating that he used the terms interchangeably. The fact that the agents found

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[2]In view of the decision in *Franks*, there is no longer any need for this Court to resolve the differences that previously existed among the courts of appeals as to what types of false statements in affidavits of probable cause require suppression of evidence. See *United States* v. *Astroff*, 556 F. 2d 1369, 1371-1372 (C.A. 5), vacated on rehearing *en banc*, No. 76-2289 (August 11, 1978); *United States* v. *Collins*, 549 F. 2d 557, 561 (C.A. 8); *United States* v. *Lee*, 540 F. 2d 1205, 1209 (C.A. 4), certiorari denied, 429 U.S. 894; *United States* v. *Rosenbarger*, 536 F. 2d 715, 720 (C.A. 6), certiorari denied, 431 U.S. 965; *United States* v. *Marihart*, 492 F. 2d 897, 899-900 (C.A. 8), certiorari denied, 419 U.S. 827; *United States* v. *Carmichael*, 489 F. 2d 983, 989 (C.A. 7) *(en banc)*.

[3]"C.A. App." refers to the appendix filed by petitioner in the court of appeals.

a meal bed (residue from the fermentation process) and not mash itself does not impeach the affidavit, since the smell of a meal bed is similar to that of mash (Tr. 299).

Petitioner also challenges (Pet. 7) the agent's statements in the affidavit that petitioner had a reputation for producing untaxed spirits and had been arrested for such activity. Petitioner emphasizes the agent's inability to identify the sources of his information and the fact that petitioner's last arrest occurred in 1959 (C.A. App. 11; Tr. 6). But this attack, at most, tends to show only that the representations in the affidavit were somewhat weak, not that they were false. In any event, issuance of the warrant was amply justified by the affiant's statement that he smelled fermenting mash on petitioner's farm (see *United States* v. *Gillette*, 383 F. 2d 843, 848 (C.A. 2) and cases there cited; see also *United States* v. *Brown*, 487 F. 2d 208 (C.A. 4), certiorari denied, 416 U.S. 909), and accordingly, even if the statements of petitioner's reputation were unfounded, they were not sufficiently material to call the validity of the warrant into question.

2. Petitioner contends (Pet. 9) that the trial court improperly permitted a Treasury Department agent to testify that about $500 in taxes should have been paid on the 53 gallons of moonshine whiskey discovered on petitioner's farm and that about $10,000 in tax revenue would have been lost if petitioner operated his still for one year (Tr. 256-261). Even assuming that evidence of the projected tax loss was improperly admitted, petitioner was not prejudiced, since the court clearly instructed the jury that the agent's tax loss projection dealt with a "hypothetical situation" (Tr. 259).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

PHILIP B. HEYMANN,
Assistant Attorney General.

JOSEPH S. DAVIS, JR.,
PAUL J. BRYSH,
Attorneys.

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